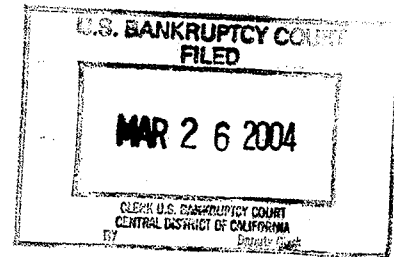


# FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA

In re ) Case No. SA 02-18998 JR  
LIZABETHA KERLO, ) Chapter 7  
MEMORANDUM OPINION  
Debtor. ) Date: February 13, 2004  
Time: 10:00 A.M.  
Room: 5A

## I. INTRODUCTION

On November 11, 2002, Lizabetha Kerlo ("Debtor") filed a chapter 7<sup>1</sup> petition. Debtor listed real property located at 902 South Oak Street, Santa Ana, California (the "Property") on her schedules. Debtor resides on the Property and also rents the Property to a number of tenants (the "Tenants"). Weneta M.A. Kosmala ("Trustee") is the chapter 7 trustee.

Trustee obtained two orders (the "Orders") requiring Debtor to turn over possession of the Property to Trustee. After Debtor

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<sup>1</sup> Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 failed to comply with the Orders, Trustee moved for a finding of  
2 civil contempt, sanctions against Debtor, and a writ of  
3 possession and order of ejectment to enforce the Orders (the  
4 "Motion"). Debtor opposed the Motion and requested that she be  
5 given additional time to refinance the Property and pay her  
6 creditors.

7 At the hearing on February 13, 2004, I found Debtor in  
8 contempt. With respect to enforcement of the Orders, I  
9 instructed Trustee to submit a supplemental brief addressing  
10 available remedies and whether enforcing the Orders implicated  
11 possible Fourth Amendment rights of Debtor or the Tenants.  
12 Debtor was given five days to respond.

## 13 14 II. JURISDICTION

15 I have jurisdiction over this matter pursuant to 28 U.S.C.  
16 § 157(b) (1). This is a core proceeding as defined in 28 U.S.C.  
17 § 157(b) (2) (A) and (E).

## 18 19 III. STATEMENT OF FACTS

20 Debtor listed the value of the Property on her schedules as  
21 \$200,000. Trustee determined that the fair market value of the  
22 Property was substantially higher and that administering the  
23 Property would generate a significant return for the estate.<sup>2</sup> On  
24 April 4, 2003, Trustee obtained an order (the "First Order")  
25

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26  
27 <sup>2</sup> In a declaration submitted with the Motion, Trustee stated  
28 that the current fair market value of the Property is between  
\$399,000 and \$425,000. Trustee also stated that the only lien on  
the Property was a trust deed in the amount of \$135,500.04. Debtor  
claimed a homestead exemption in the amount of \$44,000.

1 requiring Debtor to immediately turn over the Property to Trustee  
2 and authorizing Trustee to employ real estate agent Clarence  
3 Yoshikane to market and sell the Property. However, Debtor and  
4 her son were allowed to remain on the Property until further  
5 court order. The First Order was served on Debtor.

6 On July 8, 2003, Trustee obtain an order (the "Second  
7 Order"), requiring Debtor to turn over the Property in a vacant  
8 condition. The Second Order was to become effective seven days  
9 after entry unless Debtor converted her case to chapter 13, in  
10 which case it would be stayed pending confirmation and completion  
11 of a chapter 13 plan. If Debtor's case was reconverted to  
12 chapter 7, the Second Order would become immediately effective.  
13 Again, the Second Order was served on Debtor.

14 Debtor converted her case to chapter 13 on July 16, 2003.  
15 At the plan confirmation hearing, Debtor's case was reconverted  
16 to chapter 7. Debtor did not vacate the Property. Yoshikane  
17 attempted to enter the Property on several occasions, but was  
18 denied access by Debtor. On February 3, 2004, Trustee served  
19 notice on all occupants of the Property, stating that all  
20 tenancies and licenses on the Property were terminated and  
21 demanding immediate possession. Trustee also posted the notice  
22 on the Property.

23 On February 6, 2004, Trustee moved for a finding of civil  
24 contempt, sanctions against Debtor, and a writ of possession and  
25 order of ejectment. Trustee also requested that the United  
26 States Marshals Service be directed to take all necessary steps  
27 to remove all occupants from the Property. Finally, Trustee  
28 requested authorization to remove all personal property left on

1 the Property and to place such property in a storage unit that  
2 would then be made available to Debtor and the Tenants.

3 Debtor opposed the Motion, requesting that she be allowed  
4 additional time to attempt to refinance the secured debt on the  
5 Property. Debtor admitted that she continued to rent rooms on  
6 the Property.

7 At the hearing on February 13, 2004, I found Debtor in  
8 contempt for willfully violating the Orders. With respect to  
9 sanctions, I instructed Trustee to submit evidence of the fees  
10 and costs she incurred as a result of Debtor's conduct.<sup>3</sup> I also  
11 found that a writ of possession was appropriate to enforce the  
12 Orders under Federal Rule of Civil Procedure ("FRCP") 69 and  
13 California law.

14 However, upon further consideration, I instructed Trustee to  
15 submit a supplemental brief addressing: (1) remedies available in  
16 enforcing the Orders and (2) whether enforcing the Orders  
17 implicated any Fourth Amendment rights of Debtor or the Tenants.<sup>4</sup>  
18 Trustee submitted a supplemental brief on February 20, 2002.  
19 Debtor did not respond.

#### 21 IV. DISCUSSION

##### 22 A. Remedies Available in Enforcing the Orders

23 Trustee argues that FRCP 69 applies and authorizes the court  
24

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25 <sup>3</sup> Trustee has not submitted evidence of her fees and costs at  
26 this time. Therefore, this memorandum opinion will not address the  
award of sanctions.

27 <sup>4</sup> I also instructed Trustee to advise Debtor that she would  
28 have five days from the filing of Trustee's supplemental brief to  
respond. Trustee's counsel submitted a declaration confirming that  
Debtor had been so advised.

1 to employ the remedies available under California law to enforce  
2 the Orders. Trustee asserts that a writ of possession is the  
3 proper means of enforcing a judgment for possession under  
4 California law. Alternatively, Trustee argues that FRCP 70  
5 authorizes the court to issue a writ of possession. Finally,  
6 Trustee argues that the court may use its equitable powers to  
7 enforce the Orders by a writ of possession and order of  
8 ejectment.

9 FRCP 69 provides in pertinent part:

10 Process to enforce a judgment for the payment  
11 of money shall be a writ of execution, unless  
12 the court directs otherwise. The procedure on  
13 execution, in proceedings supplementary to  
14 and in aid of a judgment, and in proceedings  
15 on and in aid of execution shall be in  
16 accordance with the practice and procedure of  
the state in which the district court is  
held, existing at the time the remedy is  
sought, except that any statute of the United  
States governs to the extent that it is  
applicable.

17 Fed. R. Civ. P. 69 (applicable in bankruptcy under Fed. R. Bankr.  
18 P. 7069). FRCP 69 only applies to judgments for the payment of  
19 money. Hamilton v. MacDonald, 503 F.2d 1138, 1148 (9th Cir.  
20 1974). Here, the Orders do not involve the payment of money, and  
21 therefore FRCP 69 does not apply.

22 FRCP 70 provides that "[w]hen any order or judgment is for  
23 the delivery of possession, the party in whose favor it is  
24 entered is entitled to a writ of execution or assistance upon  
25 application to the clerk." Fed. R. Civ. P. 70 (applicable in  
26 bankruptcy under Fed. R. Bankr. P. 7070). In Hamilton, the  
27 district court issued a judgment declaring that the Hopi and  
28 Navajo indian tribes were entitled to joint and equal possession

1 and ownership of certain reservations lands. Hamilton, 503 F.2d  
2 at 1142. In a later proceeding to enforce the judgment, the  
3 district court determined that the Hopi indian tribe had been  
4 improperly excluded from the reservation lands, and therefore  
5 issued a writ of assistance pursuant to FRCP 70. Id. On appeal,  
6 the Ninth Circuit affirmed, stating that "a writ of assistance to  
7 deliver joint possession in the joint use area to the excluded  
8 Hopi Indian Tribe was agreeable to the usages and principles of  
9 law" and that such relief "clearly lies under the express terms  
10 of Fed. R. Civ. P. 70." Id. at 1143, n.5.

11 However, because this is a contested matter, FRBP 7070 does  
12 not apply without a court order. Fed. R. Bankr. P. 9014(c).  
13 FRBP 9014(c) provides that certain of the rules governing  
14 adversary proceedings are applicable in contested matters  
15 "[u]nless the court directs otherwise." Fed. R. Bankr. P.  
16 9014(c). FRBP 7070 is not listed under 9014(c). However, FRBP  
17 9014(c) also provides that other adversary rules may be applied  
18 to contested matters upon notice and order from the court.  
19 Therefore, a court order applying FRBP 7070 is a necessary step  
20 in obtaining relief under FRBP 7070 in a contested matter.<sup>5</sup>

21 Here, the Second Order requires Debtor to deliver possession  
22 of the Property to Trustee. Pursuant to a noticed order to show  
23 cause hearing, the court ordered the application of FRBP 7070 to  
24 this matter. Therefore, a writ of execution under FRCP 70 is an  
25 available remedy to enforce the Second Order.

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26  
27 <sup>5</sup> As a matter of practice, in contested matters seeking to  
28 enforce an order for turnover of property of the estate from the  
debtor, trustees should request that the court apply FRBP 7070 in  
their motion.

1        Additionally, § 105(a) provides:

2            The court may issue any order, process, or  
3            judgment that is necessary or appropriate to  
4            carry out the provisions of this title. No  
5            provision of this title providing for the  
6            raising of an issue by a party in interest  
7            shall be construed to preclude the court  
8            from, sua sponte, taking any action or making  
9            any determination necessary or appropriate to  
10           enforce or implement court orders or rules,  
11           or to prevent an abuse of process.

12        11 U.S.C. § 105(a). Under the Bankruptcy Code, a debtor has a  
13        duty to surrender property of the estate to the trustee. Id.  
14        § 521(4). Furthermore, a trustee has the duty to "collect and  
15        reduce to money the property of the estate for which such trustee  
16        serves . . . ." Id. § 704(1). Finally, "any entity, other than  
17        a custodian, in possession, custody or control of property that  
18        the trustee may use, sell, or lease under section 363 of this  
19        title . . . shall deliver to the trustee, and account for, such  
20        property or the value of such property . . . ." Id. § 542(a).

21        A bankruptcy court has authority to enforce judgments for  
22        possession of property through writs and other orders under  
23        § 105(a). See Stone v. White (In re Stone), No. 92-01383, 1998  
24        WL 1819081, at \*4 (Bankr. D.C. Nov. 4, 1998) (discussing a writ  
25        of possession issued to enforce a turnover order); Toledano v.  
26        Kittay (In re Toledano), 299 B.R. 284, 299 (Bankr. S.D.N.Y. 2003)  
27        (stating that in the event that the debtor or any other  
28        individuals occupying property of the estate did not voluntarily  
29        vacate the premises in accordance with the court's order, the  
30        trustee is authorized to direct the United States Marshals  
31        Service to effectuate the terms of the order by evicting all  
32        occupants from the premises).

1 Here, in order to carry out her statutory duties, Trustee  
2 must administer the Property for the benefit of creditors.  
3 Trustee is unable to market and sell the Property as a result of  
4 Debtor's failure to comply with the Orders. Accordingly,  
5 enforcing the Orders through a writ of execution is necessary and  
6 appropriate to carry out the provisions of the Bankruptcy Code.

7 B. Fourth Amendment Applicability

8 Trustee argues that enforcement of the Orders does not  
9 implicate the Fourth Amendment rights of Debtor or the Tenants  
10 because (1) Trustee is not acting as an instrument or agent of  
11 the government and (2) Debtor and the Tenants no longer have a  
12 legitimate expectation of privacy with respect to the Property.

13 The Fourth Amendment provides:

14 The right of the people to be secure in their  
15 persons, houses, papers, and effects, against  
16 unreasonable searches and seizures, shall not  
17 be violated, and no Warrants shall issue, but  
18 upon probable cause, supported by Oath or  
affirmation, and particularly describing the  
place to be searched, and the persons or  
things to be seized.

19 U.S. Const. Amend. IV.

20 1. Trustee as Instrument or Agent of the Government

21 The Fourth Amendment generally does not protect against  
22 unreasonable intrusions by private parties. See Burdeau v.  
23 McDowell, 256 U.S. 465, 475 (1921). However, the Fourth  
24 Amendment applies to the conduct of private parties acting as  
25 instruments or agents of the government. Coolidge v. New  
26 Hampshire, 403 U.S. 443, 487 (1971). The Ninth Circuit has  
27 explained:

28 [T]here exists a "gray area" between the  
extremes of overt governmental participation



1 in a search and the complete absence of such  
2 participation. The resolution of cases  
3 falling within the "gray area" can best be  
4 resolved on a case-by-case basis with the  
5 consistent application of certain general  
6 principles.

7 United States v. Walther, 652 F.2d 788, 791-92 (9th Cir. 1981)

8 (citations omitted). In a later case, the Ninth Circuit stated:

9 The general principles for determining  
10 whether a private individual is acting as a  
11 governmental instrument or agent for Fourth  
12 Amendment purposes have been synthesized into  
13 a two part test. According to this test, we  
14 must inquire:

15 (1) whether the government knew of and  
16 acquiesced in the intrusive conduct; and (2)  
17 whether the private party intended to assist  
18 law enforcement efforts or further his own  
19 ends.

20 United States v. Reed, 15 F.3d 928, 931 (9th Cir. 1994) (citing  
21 United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982)).

22 The same test applies to non-law enforcement government  
23 employees. United States v. Attson, 900 F.2d 1427, 1433 (9th  
24 Cir. 1990). Discussing the second part of the test, the Attson  
25 court explained that "'where the private party has had a  
26 legitimate independent motivation for' engaging in the challenged  
27 conduct, the fourth amendment would not apply." Attson, 900 F.2d  
28 at 1432 (quoting Walther, 652 F.2d at 792).

29 In Attson, Attson was convicted for manslaughter for driving  
30 his vehicle while drunk and causing the death of his passengers.  
31 When taken to a hospital, he consented to emergency care. The  
32 attending doctor ordered a blood test to see if alcohol was  
33 masking symptoms of pain. The district court allowed the blood  
34 test results at trial after denying a suppression motion. The

1 Ninth Circuit affirmed after analyzing Walther's two part test:  
2 "(1) the government's knowledge and acquiescence [of the  
3 challenged conduct], and (2) the intent of the party performing  
4 the search." Walther, 652 F.2d at 792. Focusing on the second  
5 prong, the court concluded that the government doctor did not act  
6 with the intent to assist the police in its investigatory or  
7 administrative purposes. Rather, the doctor acted with an  
8 independent purpose, that being to test the blood for medical  
9 reasons. Attson, 900 F.2d at 1432.

10 The Ninth Circuit has refused to apply the Fourth Amendment  
11 in several different contexts based on the legitimate independent  
12 motivation of the private party that engaged in the challenged  
13 conduct. See Miller, 688 F.2d at 657 (search of the defendant's  
14 residence by a private party for the purpose of recovering stolen  
15 property); United States v. Chukwubike, 956 F.2d 209, 212-13 (9th  
16 Cir. 1992) (intrusive medical procedures used by a physician in  
17 order to protect the defendant's health and safety); United  
18 States v. Gomez, 614 F.2d 643, 645 (9th Cir. 1979) (search of  
19 misplaced luggage by an airline employee for the purpose of  
20 identifying the owner).

21 Furthermore, the involvement of government officials does  
22 not necessarily transform private conduct into a government  
23 search or seizure. See Chukwubike, 956 F.2d at 212-13 (defendant  
24 detained and transported to the hospital by customs officials  
25 prior to treatment by a physician); Gomez, 614 F.2d at 645  
26 (misplaced luggage found and transported by a county detective  
27 prior to search by an airline employee). This is especially true  
28 where the purpose of the government presence is to ensure the

1 safety of the private party and not to "reap the benefits" of the  
2 search or seizure. Miller, 688 F.2d at 658 (search of  
3 defendant's residence by a private party accompanied by a federal  
4 agent).

5 In Taunt v. Barman (In re Barman), 252 B.R. 403, 412-13  
6 (Bankr. E.D. Mich. 2000), the bankruptcy court stated:

7 [The] circumstances surrounding the status  
8 and function of a trustee in a chapter 7 case  
9 all suggest a sufficient nexus to the  
10 government and its power that it is necessary  
11 and appropriate to apply to the trustee the  
12 fourth amendment limits on government power.

13 The Barman court began its analysis by applying the standard for  
14 whether the actions of a private person are fairly attributable  
15 to the government in the context of a violation of the Fourteenth  
16 Amendment.<sup>6</sup> In determining that a trustee acts under "color of  
17 law," the court discussed the statutory obligations, judicial  
18 control, and executive oversight of trustees under the Bankruptcy  
19 Code. Id. at 411-12. The court in Spacone v. Burke (In re  
20 Truck-A-Way), 300 B.R. 31, 38 (E.D. Cal. 2003), cited Barman and  
21 implicitly adopted the holding without discussion.

22 Trustee correctly asserts that neither the Barman court nor  
23 the Truck-A-Way court applied the two part test articulated by  
24 the Ninth Circuit for determining whether a private party acted

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25 <sup>6</sup> The Barman court relied on Lugar v. Edmonson Oil Co., 457  
26 U.S. 922, 937 (1982), as providing an "analogous context under  
27 state law." Lugar involved a suit under 42 U.S.C. § 1983 for a  
28 violation of the Fourteenth Amendment. In beginning its analysis,  
the Lugar court explained that "[t]his case concerns the  
relationship between the § 1983 requirement of action under color  
of state law and the Fourteenth Amendment requirement of state  
action." Lugar, 457 U.S. at 924.

1 as an instrument or agent of the government. Instead, these  
2 courts court determined that the Fourth Amendment applies because  
3 a trustee acts under color of law.

4 The Ninth Circuit has stated:

5 Unlike the "state actor" standard of the  
6 Fourteenth Amendment or the "color of law"  
7 standard of section 1983, the fourth  
8 amendment cannot be triggered simply because  
9 a person is acting on behalf of the  
10 government. The fourth amendment will only  
11 apply to government conduct that can  
12 reasonably be characterized as a "search" or  
13 a "seizure." Thus, for the conduct of a non-  
14 law enforcement governmental party . . . to  
15 be subject to the Fourth Amendment,  
16 [plaintiff] must show that [defendant] acted  
17 "with the intent to assist the government in  
18 its investigatory or administrative purposes,  
19 and not for an independent purpose."

20 Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 924  
21 (9th Cir. 2001) (citing Attson, 900 F.2d at 1429, 1433).

22 Accordingly, the Barman and Truck-A-Way courts did not apply  
23 Ninth Circuit law when they determined that the Fourth Amendment  
24 governed a trustee's conduct.

25 Trustees in bankruptcy are not law enforcement officials.  
26 As previously discussed, a trustee is required to assemble assets  
27 of the estate, liquidate those assets for the benefit of  
28 creditors, and distribute proceeds of the estate to creditors.  
29 Although trustees may seek the assistance of governmental  
30 officials in carrying out their statutory and fiduciary duties  
31 and orders of the court, they do not act to assist the government  
32 in its investigatory or administrative activities. Rather, the  
33 trustees act independently under their statutory mandate in the  
34 Bankruptcy Code. Accordingly, a trustee or agent to a trustee is

1 only subject to the Fourth Amendment if (1) the government knew  
2 of and acquiesced in the conduct and (2) the trustee acted with  
3 the intent to assist the government in its investigatory or  
4 administrative purposes. Attson, 900 F.2d at 1433.

5 Here, Trustee seeks to involve the government (the Marshals  
6 Service) to assist her in carrying out the Orders. Indeed, this  
7 is the only way that Trustee can effectively enforce the Orders.  
8 In doing this, Trustee's motivation is not to assist the  
9 government in any investigation or administrative action.  
10 Rather, Trustee's intent is to enlist the government to assist  
11 her in carrying out her statutory and fiduciary duties to  
12 creditors of the estate. Trustee's motivation is to maximize the  
13 value of the assets of the estate for distribution to creditors.  
14 Therefore, Trustee has a legitimate, statutory, independent  
15 reason for enforcing the Orders. She is not acting as an  
16 instrument or agent of the government to carry out or facilitate  
17 a governmental purpose that is subject to the limitations.

18 Additionally, the use of the Marshals Service to assist in  
19 implementing the Orders does not transform Trustee's actions into  
20 a government search or seizure. Rather, the sole purpose for  
21 involving the Marshals Service is to assist Trustee in removing  
22 Debtor, any other occupants, and any personal items on the  
23 Property, and to protect Trustee and her agents from any threats  
24 to their safety.

## 25 2. Legitimate Expectation of Privacy

26  
27 To invoke Fourth Amendment protections, a person must show a  
28 legitimate expectation of privacy. Smith v. Maryland, 442 U.S.

1 735, 740 (1979). A legitimate expectation of privacy requires  
2 both (1) a subjective expectation of privacy, and (2) an  
3 objectively reasonable expectation of privacy. Id. In  
4 determining whether someone has a legitimate expectation of  
5 privacy for Fourth Amendment purposes, courts consider the  
6 following factors: (1) whether the person has a proprietary or  
7 possessory interest in the place searched or property to be  
8 seized, (2) whether the person has the right to exclude others  
9 from the premises, (3) whether the person has taken normal  
10 precautions to maintain his or her privacy, and (4) whether the  
11 person is legitimately on the premises. See United States v.  
12 Cella, 568 F.2d 1266, 1280 (9th Cir. 1977); Shamaeizadeh v.  
13 Cunigan, 338 F.3d 535, 544-45 (6th Cir. 2003).

14 Generally, a person's home is "accorded the full range of  
15 Fourth Amendment protections." Lewis v. United States, 385 U.S.  
16 206, 211 (1966). However, the Barman court observed:

17 [D]ebtors who have filed for bankruptcy relief  
18 must have a significantly reduced expectation  
19 of privacy in their "houses, papers, and  
20 effects" that society is prepared to recognize  
21 as reasonable. The reduced expectation of  
privacy is a natural consequence of the  
substantial and detailed disclosures that are  
inherent in the bankruptcy process.

22 Barman, 252 B.R. at 414. On the other hand, a debtor is not  
23 automatically stripped of any and all reasonable expectations of  
24 privacy with respect to property of the estate due to a bankruptcy  
25 filing. Id. at 415. Rather, whether a debtor has a reasonable  
26 expectation of privacy with respect to certain property must be  
27 determined on a case by case basis. See Rakas v. Illinois, 439  
28 U.S. 128, 147-48 (1978).

1 No cases discuss whether a debtor who has been ordered to  
2 turn over property of the estate can have a legitimate expectation  
3 of privacy with respect to that property. However, in an  
4 analogous context, courts have stated that when a tenant's right  
5 to possession of leased premises has terminated, a government  
6 search of the premises does not violate the tenant's Fourth  
7 Amendment rights. See Eisentrager v. Hocker, 450 F.2d 490, 491-92  
8 (9th Cir. 1971); see also United States v. Botelho, 360 F.Supp.  
9 620, 625 (D. Hawaii 1973).

10 Additionally, guests in hotel rooms are generally afforded  
11 the same Fourth Amendment protections as persons in their homes.  
12 Stoner v. California, 376 U.S. 483, 490 (1964); United States v.  
13 Nerber, 222 F.3d 597, 600 n.2 (9th Cir. 2000). Any legitimate  
14 expectation of privacy of a guest with respect to a hotel room  
15 generally expires at checkout time. United States v. Huffhines,  
16 967 F.2d 314, 318 (9th Cir. 1992); see also United States v.  
17 Haddad, 558 F.2d 968, 975 (9th Cir. 1977) (holding that a hotel  
18 guest lawfully ejected from his room for disorderly conduct had no  
19 possessory interest, and therefore no legitimate expectation of  
20 privacy with respect to the room).

21 Here, Debtor filed a bankruptcy petition, at which time the  
22 Property became part of the estate. Trustee determined that there  
23 was equity in the Property that could be administered for the  
24 benefit of creditors. Trustee obtained the First Order which  
25 allowed only Debtor and her son to remain on the Property. When  
26 Debtor failed to comply with the First Order, Trustee obtained the  
27 Second Order which required that Debtor and the Tenants vacate the  
28 Property upon reconversion of Debtor's case to chapter 7. Trustee

1 served Debtor with a copy of the Orders and posted a notice on the  
2 premises stating that all tenancies and licenses were terminated.  
3 Debtor did not appeal or otherwise seek reconsideration of the  
4 Orders.

5       Upon reconversion, Debtor was required to surrender the  
6 Property to Trustee in a vacant condition pursuant to the Second  
7 Order. Accordingly, Debtor and the Tenants no longer have a  
8 possessory interest in the Property, cannot properly exclude  
9 Trustee or her agents from the Property, and are not "legitimately  
10 on the premises." Cella, 568 F.2d at 1280. Under these  
11 circumstances, neither Debtor nor the Tenants have a legitimate  
12 expectation of privacy with respect to the Property.

13       Additionally, a search or seizure of voluntarily abandoned  
14 property does not violate the Fourth Amendment. Id. at 1283. The  
15 Cella court explained:

16               Abandonment in this context is not meant in  
17               the strict property-right sense, but rests  
18               instead on whether the person so relinquished  
19               his interest in the property that he no longer  
              retains a reasonable expectation of privacy in  
              it at the time of the search.

20 Id. Because Debtor and the Tenants no longer have a legitimate  
21 expectation of privacy with respect to the Property, any personal  
22 items left on the Property constitute abandoned property for the  
23 purposes of the Fourth Amendment. Accordingly, the orderly  
24 removal of personal property by Trustee does not implicate any  
25 Fourth Amendment rights.

26  
27                               V. CONCLUSION

28       FRBP 7070 authorizes a court to enforce a judgment for



1 possession of property by issuing a writ of execution or  
2 assistance. Because Trustee is unable to administer the Property  
3 due to Debtor's failure to comply with the Orders, such relief is  
4 necessary and appropriate under these circumstances. Therefore, a  
5 writ of execution for possession of the Property in the form  
6 attached hereto as Exhibit A is issued by this court.

7 In addition, enforcement of the Orders does not implicate the  
8 Fourth Amendment rights of Debtor or the Tenants. Trustee is not  
9 acting as an instrument or agent of the government in enforcing  
10 the Orders. Furthermore, Debtor and the Tenants do not have a  
11 legitimate expectation of privacy with respect to the Property or  
12 any personal items left thereon.

13 This memorandum opinion shall constitute my findings of fact  
14 and conclusions of law.

15  
16 Dated:

17 MAR 26 2004

  
18 JOHN E. RYAN  
United States Bankruptcy Judge

EXHIBIT A

UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA

In re ) Case No. SA 02-18998 JR  
LIZABETHA KERLO, ) Chapter 7  
Debtor. ) WRIT OF EXECUTION FOR  
POSESSION OF REAL PROPERTY  
Date: February 13, 2004  
Time: 10:00 A.M.  
Room: 5A

TO THE UNITED STATES MARSHALL FOR THE CENTRAL DISTRICT OF  
CALIFORNIA:

In the above referenced bankruptcy case, Debtor was ordered to deliver possession of real property located at 902 South Oak Street, Santa Ana, California that includes the residence, and garage structure and attached room (the "Property") to Weneta M.A. Kosmala ("Trustee") as chapter 7 trustee (the "Order"). However, Debtor and other tenants on the Property have refused to comply with the Order. Therefore, pursuant to Federal Rule of Bankruptcy Procedure 7070, as made applicable to this proceeding by order of this court dated March 26, 2004, and § 105 of the

1 Bankruptcy Code, it is hereby

2 ORDERED that you are directed and authorized to enforce the  
3 judgment attached hereto as Exhibit "A" and entitled "ORDER  
4 GRANTING CHAPTER 7 TRUSTEE'S MOTION FOR ORDER COMPELLING DEBTOR  
5 TO TURNOVER CERTAIN REAL PROPERTY PURSUANT TO 11 U.S.C. SECTION  
6 542" pursuant to the following terms and conditions:

7 1) Trustee and/or her agents are to accompany the United  
8 States Marshal to take possession of the Property;

9 2) Trustee, in her capacity as chapter 7 trustee of Debtor's  
10 estate, will act as custodian of any and all items of personal  
11 property left on the Property at the time possession is taken;

12 3) The United States Marshal, in taking possession of the  
13 Property, shall employ whatever reasonable force is necessary to  
14 enter the Property, regardless of whether the premises are locked  
15 or unlocked, occupied or unoccupied;

16 4) Anyone interfering with the enforcement of the Order is  
17 subject to arrest by the United States Marshal;

18 IT IS FURTHER ORDERED that Trustee is authorized to use  
19 estate funds to pay all reasonable and necessary fees and  
20 expenses incurred in enforcing the Order to the United States  
21 Marshal and/or to pay all reasonable and necessary expenses to  
22 remove and store the items of personal property left on the  
23 Property.

24 IT IS FURTHER ORDERED that Trustee is authorized to hire and  
25 pay all reasonable and necessary fees and expenses to a locksmith  
26 to assist in taking possession of the Property.

27 IT IS FURTHER ORDERED that Trustee shall take and store any  
28 abandoned personal property that is left on the Property and make

1 such property available to Debtor and/or the other tenants on the  
2 Property upon request and reasonable notice. Any abandoned  
3 property that is not properly claimed shall be disposed of in  
4 accordance with California state law.

5 Dated:

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7 JOHN E. RYAN  
United States Bankruptcy Judge  
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